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IN THE
COURT OF APPEALS OF INDIANA

CLAUDE DAVID SWARTZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A01-0609-CR-396
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAWRENCE CIRCUIT COURT
The Honorable Andrea McCord, Judge
Cause Nos. 47C01-0210-FC-609;47C01-0510-FB-581;47C01-0512-FD-704

March 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Claude David Swartz brings this consolidated appeal from the sentences imposed by the trial court following the revocation of a suspended sentence and guilty pleas to two counts of Possession of Methamphetamine,[1] a class D felony, and to being a habitual offender[2]. In particular, Swartz contends that the trial court erred in failing to consider his guilty pleas as a mitigating circumstance and that the sentences are inappropriate in light of the nature of the offenses and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

Cause No. 47C01-0510-FB-581 ("cause 581")

On October 3, 2005, Swartz possessed methamphetamine, which he then injected into his body. On October 6, 2005, the State charged Swartz with class B felony dealing in methamphetamine and class D felony possession of precursors. On November 23, 2005, Swartz pleaded guilty to class D felony possession of methamphetamine in exchange for the State's agreement to amend the class B felony dealing charge to the class D felony possession charge and to dismiss its petition for revocation of Swartz's sentence in another cause.[3]

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[1] Ind. Code § 35-48-4-6(a).

[2] Ind. Code § 35-50-2-8.

[3] That other cause happens to be cause 609, the next one discussed in this opinion. Swartz ultimately squandered the State's agreement not to revoke his suspended sentence in cause 609 based on the October 3, 2005, incident, inasmuch as he violated his probation in cause 609 again, leading to the State's petition to revoke his sentence therein filed on December 21, 2005.

Cause No. 47C01-0210-FC-609 ("cause 609")

On August 12, 2003, Swartz pleaded guilty to class C felony robbery and was later sentenced to seven years of incarceration with three years suspended to probation. On December 21, 2005, the State filed an amended petition to revoke Swartz's suspended sentence, alleging, among other things, that Swartz knowingly possessed methamphetamine on December 17, 2005.

Cause No. 47C01-0512-FD-704 ("cause 704")

On December 17, 2005, Swartz possessed methamphetamine in Lawrence County.[4] On December 20, 2005, the State charged Swartz with class D felony possession of methamphetamine and class D felony possession of a schedule I controlled substance, and on January 17, 2006, the State charged Swartz with being a habitual offender. On May 1, 2006, Swartz pleaded guilty to class D felony possession of methamphetamine and to being a habitual offender. Pursuant to the plea agreement, the executed portion of his sentence in this cause was capped at six years of incarceration.

Sentencing

On June 14, 2006, the trial court held a consolidated sentencing hearing for causes 581, 609, and 704. In causes 581 and 704, the trial court found the following aggravating circumstances: Swartz's criminal history, that he was on probation when he committed these crimes, his high risk of recidivism, and the danger posed to the community from Swartz's continued possession of methamphetamine. The trial court found no mitigating factors. In

[4] This incident was the basis of the State's petition to revoke Swartz's suspended sentence in cause 609.

cause 581, the trial court sentenced Swartz to three years of incarceration for class D felony possession of methamphetamine. In cause 609, the trial court revoked Swartz's suspended sentence and ordered that he serve the remaining three years of his sentence. In cause 704, the trial court sentenced Swartz to three years of incarceration for class D felony possession of methamphetamine and to three years of incarceration for being a habitual offender. The trial court ordered that all sentences would be served consecutively, for an aggregate sentence of twelve years. Swartz now appeals.

DISCUSSION AND DECISION

Swartz argues that the trial court erred in failing to consider his guilty plea as a mitigating factor and in imposing sentences that are inappropriate in light of the nature of the offenses and his character. As we consider these arguments, we observe that the amended sentencing statute provides that a person who commits a class D felony "shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years." Ind. Code § 35-50-2-7(a).[5] A person who is found to be a habitual offender shall be sentenced to "an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense." I.C. § 35-50-2-8(h).

[5] Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences and to comply with the holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). See Ind. Code § 35-38-1-7.1, § 35-50-2-1.3. Swartz committed the instant offenses and was sentenced after the effective date. Consequently, we will apply the amended statute and refer to Swartz's "advisory" sentences.

We have the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). However, sentence review under Appellate Rule 7(B) is very deferential to the trial court's decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court, Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The finding of mitigating circumstances is not mandatory and rests within the trial court's discretion. Moyer v. State, 796 N.E.2d 309, 313 (Ind. Ct. App. 2003). The trial court has the discretion to determine the existence of and the weight to be given a mitigating circumstance. Davies v. State, 758 N.E.2d 981, 987 (Ind. Ct. App. 2001). The trial court is not required to accord the same weight to a mitigating circumstance as would the defendant. Id.

Swartz contends that the trial court erred in declining to find his guilty pleas to be mitigating circumstances. Initially, we observe that Swartz did not advance his guilty pleas as possible mitigators before the trial court; consequently, he is precluded from raising this issue for the first time on appeal. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000).

Waiver notwithstanding, we observe that although a guilty plea may be considered a mitigating factor, it is not automatically a significant mitigating factor. Haggard v. State, 771 N.E.2d 668, 677 (Ind. Ct. App. 2002). Where, as here, the defendant reaps a substantial

benefit from a plea agreement, a guilty plea does not constitute a mitigating circumstance. Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). In cause 581, the reduction in charges in exchange for his plea reduced Swartz's maximum possible sentence from twenty-nine to twelve years of incarceration. Moreover, the State agreed to dismiss its petition to revoke his suspended sentence in cause 609—a benefit Swartz later squandered, but a significant temporary benefit nonetheless. In cause 704, the sentence cap in exchange for his plea reduced his maximum sentence from seven and one-half years to six years. Consequently, we conclude that the trial court properly declined to find the guilty pleas to be a mitigating circumstance.

As to the nature of the offenses, Swartz repeatedly possessed methamphetamine over a short period of time, even while on probation and facing unrelated, similar charges. As to his character, we note that the trial court found a number of aggravating factors, which Swartz does not dispute—Swartz's extensive criminal history,[6] that Swartz was on probation when he committed these crimes, his high risk of recidivism, and the danger posed to the community from his continued possession of methamphetamine. Swartz has shown contempt for the law and has refused to conform his behavior to the norms of society. Consequently, we conclude that the sentences imposed by the trial court are not inappropriate in light of the nature of the offenses and Swartz's character.

The judgment of the trial court is affirmed.

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[6] Swartz was adjudged truant as a juvenile three times. As an adult, Swartz has amassed prior convictions for class D felony theft, class D felony possession of a controlled substance, two counts of class B misdemeanor

DARDEN, J., and ROBB, J., concur.

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public intoxication, class A misdemeanor battery, class C misdemeanor failure to stop, class C felony robbery, and a felony theft conviction in Texas.